81210-1

No. 255247

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

RESPONDENT,

v.

JASON LEE FRY,

APPELLANT.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner is Jason Lee Fry, the Appellant in the Court of Appeals.

B. DECISION BELOW

Review is sought of the Published Opinion of the Court of Appeals entered January 8th, 2008, which affirmed the Court of Appeals. A copy is attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Officers went to the residence of Petitioner and smelled marijuana as they approached. The Petitioner informed the officers he had authority from his physician to use marijuana, and the Petitioner's wife showed the officers the signed physician authorization. Did this information provide probable cause for the issuance of a search warrant?

2. In a stipulated facts bench trial, part of the evidence was the physician's statement authorizing Petitioner to use marijuana for medicinal purposes. Did the trial court err in concluding that the physician's statement did not validly authorize Petitioner to use marijuana, and not allowing Petitioner to present the defense of medical use of marijuana before concluding he was guilty of

possession of marijuana over 40 grams?

D. STATEMENT OF THE CASE

Petitioner was convicted after a bench trial in which the facts were stipulated. CP 45-48. He was sentenced to 30 days of confinement, converted to community service. CP 50-64.

Prior to trial, the defense made a motion to suppress the evidence which had been seized pursuant to a search warrant. The motion also notified the Superior Court and State that the Defendant would assert the affirmative defense of medical marijuana authorization pursuant to RCW 69.51A.040. CP 4.

The Defendant's Memorandum in Support of Motion to Suppress Evidence asserted that since the officers were informed at the time of the contact at Defendant's residence that he had a physician's authorization to use marijuana, and were shown the written authorization, that there was no probable cause to believe a crime was being committed. CP 5-6.

The document attached to the Memorandum was entitled "Documentation of Medial Authorization to Possess Marijuana for Medical Purposes in Washington State." It is signed by Thomas

Orvald, M.D.. The statement indicates that the documented medical condition from a previous healthcare provider was "severe anxiety, rage & depression related to childhood." CP 8-9. The document specifies that Dr. Orvald was treating the patient for "a terminal illness or debilitating condition as defined in RCW 69.51A.010." It also states: "It is my medical opinion that the potential benefits of medical use of marijuana would likely outweigh the health risks for this patient." CP 8.

Dr. Orvald appears to adopt the prior diagnosis and indicates "can't function." CP 10. Notes from a physical examination revealed a scar behind the right ear, and on the chin, from being injured "by horse." It is stated that there is hearing loss, the throat is inflamed and the patient sometimes has difficulty swallowing. Positive signs are circled for a number of symptoms or conditions, including murmurs of the heart and masses of the abdomen. It is indicated he had a diagnosis of chronic bronchitis, apparently while "in service." Under a comments section the doctor wrote that the patient found that use of "medical cannibis" allowed him to function and control his rage and depression. The patient had been kicked

three times by horses and had an "unsettled growing up in foster homes." CP 11.

After hearing arguments from the parties, the Superior Court entered an "Order Denying Motion to Suppress." The judge found that the strong odor of marijuana coming from the house provided probable cause to believe a crime was being committed. The judge further held that the fact that there was a claim of medical authorization to use marijuana was an affirmative defense for trial, and did not negate probable cause to search. Further, the judge found, the Defendant had not provided proof of his identity at the time, as would be required for a medical marijuana defense. CP 39-40.

The case was submitted on stipulated facts in a bench trial resulting in a document entitled "Stipulated Fact Trial." In this document, the trial court judge found that 911 grams of marijuana had been found in the Defendant's residence. The findings specifically note that "no distinction was made as to roots, 'shake,', and/or 'buds' (i.e. medically usable portion of a marijuana plant)." RP 65-67, including Finding of Fact No. 7.

Finding of Fact No. 6 includes that: "Fry's wife, Tina, gave the officers documents entitled "medical marijuana authorization." RP 67.

The trial court's Conclusions of Law included that "... Defendant Jason Lee Fry may not tender his medical marijuana defense and/or collateral estoppel defense ... ." CP 67. The Defendant was found guilty of possession of marijuana in excess of 40 grams. RP 46.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The trial court erred in denying the motion to suppress evidence from the search of Appellant's residence

Review of this issue should be accepted pursuant to RAP 13.4(b)(3) as presenting a significant question of law under the constitutions of the State and the United States.

The Washington Constitution provides that, "no person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. 1, § 7.

The Fourth Amendment to the United States Constitution states:

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, ...

There is probable cause to issue a search warrant when a magistrate can reasonably infer from the facts and circumstances that contraband exists at a certain location. *In re Pers. Restraint of Yim,* 139 Wn.2d 581, 594, 989 P.2d 512 (1999).

A search warrant may be issued only upon a finding of probable cause. *State v. Thein,* 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Probable cause exists when the affidavit in support of the warrant contains facts and circumstances from which a reasonable person could infer that criminal activity is probably occurring and that evidence of such activity can be found at the place to be searched. *State v. Anderson,* 105 Wn.App. 223, 229, 19 P.3d 1094 (2001).

Under the facts of the case at bar, probable cause must be reviewed in the context of the The Medical Use of Marijuana Act, RCW 69.51A.005 et. seq..

The purpose of the Act is to allow patients with terminal or debilitating illnesses to use marijuana when authorized by their treating physician. RCW 69.51A.005

> (1) If charged with a violation of state law relating to marijuana, any qualifying patient who is engaged in the medical use of marijuana, or any designated primary caregiver who assists a qualifying patient in the medical use of marijuana, will be deemed to have established an affirmative defense to such charges by proof of his or her compliance with the requirements provided in this chapter. Any person meeting the requirements appropriate to his or her status under this chapter shall be considered to have engaged in activities permitted by this chapter and shall not be penalized in any manner, or denied any right or privilege, for such actions.
>
> (2) The qualifying patient, if eighteen years of age or older, shall:
>
> (a) Meet all criteria for status as a qualifying patient;
>
> (b) Possess no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply; and
>
> **(c) Present his or her valid documentation to any law enforcement official who questions the patient regarding his or her medical use of marijuana.**
>
> (3) The qualifying patient, if under eighteen years of age, shall comply with subsection (2)(a) and (c) of this section. However, any possession under subsection (2)(b) of this section, as well as any production, acquisition, and decision as to dosage and frequency of use, shall be the responsibility

of the parent or legal guardian of the qualifying patient.
...

(The remainder of this section deals with a primary caregiver.)

RCW 69.51A.040 (emphasis added.)

The act defines "qualifying patient" as one who:

(a) Is a patient of a physician licensed under chapter 18.71 or 18.57 RCW;

(b) Has been diagnosed by that physician as having a terminal or debilitating medical condition;

(c) Is a resident of the state of Washington at the time of such diagnosis;

(d) Has been advised by that physician about the risks and benefits of the medical use of marijuana; and

(e) Has been advised by that physician that they may benefit from the medical use of marijuana.

RCW 69.51A.010(3)

As has been noted by the Supreme Court of Washington:

A defendant seeking to present compassionate use as an affirmative defense must present valid documentation to any officer who questions the presence of marijuana. RCW 69.51A.040(2)(c).

State v. Tracy, 158 Wn.2d 683, 689, Fn.4 147 P.3d 559 (2006)

In this case, the trial court essentially ruled that it was irrelevant to

the issue of probable cause to search, whether or not the Defendant had shown documentation for medical use of marijuana. This was because, according to the trial court, it was an "affirmative defense" to be brought up at trial on the issue of guilt. CP 40.

This is contrary to the legislative intent, which is that you are not committing a crime if you have the proper document from a physician to allow the use of marijuana. What is the purpose in presenting the documentation to any officer questioning the presence of the marijuana? If it is not relevant to the reasonableness of the search and seizure then any documentation would simply be presented at trial, contrary to what the statute requires.

Treating the presentation of valid documentation to an officer at the initial contact as irrelevant on the issue of probable cause essentially renders RCW 69.51A.040(2)(c) superfluous. This Court should not do likewise.

The Court of Appeals incorrectly relies upon *McBride v. Walla Walla County,* 95 Wn. App. 33, 39, 975 P.2d 1029 (1999), in which McBride appealed the dismissal of a civil false arrest suit.

After McBride's arrest, the charge was dismissed because he had acted in self-defense. The Court of Appeals upheld the ruling of the trial court that an affirmative defense did not effect the probable cause determination. But in that case, if there was probable cause to suspect a person committed an assault against a family or household member, then RCW 10.31.100(2)(b) mandated that there be an arrest. There is no similar requirement in this case. Further, the existence of self-defense may be based largely on oral claims and the prosecutor is better equipped to decide later if dismissal is warranted. Here, the officers were not weight conflicting stories. Where valid documentation from a physician is presented, and the only "probable cause" is the smell of marijuana, the documentation negates probable cause at that moment.

If the user goes to the effort to obtain the medical documentation, and to present it to a questioning officer, then it should enter into the question of whether there is a probable cause to believe a crime is being committed. Further, our State Constitution prohibits invasion on one's "private affairs" without adequate cause. The presence of valid medical documentation, along with evidence of some

marijuana use, means only that one is exercising his right to medicate as authorized by law, which could not be more private.

Subsection (1) of RCW 69.51A.040 indicates the user with the required documentation shall not be "denied any right or privilege" thereby. For the trial court's ruling to be correct, having police enter your home for a search and seizure after showing valid documentation would not be denying the user any right or privilege. There is no point in searching without seizing, so under the trial court's understanding of the statute, a valid user is still subject to search and seizure, meaning his or her medicinal marijuana is taken by the police.

It is unlikely anyone would obtain the documentation without using the marijuana, so the logical effect of the trial court's ruling is that all those who obtain medical documentation for using marijuana are under suspicion, and all of their marijuana is to be seized by police. Only after appearing for a trial on the issue of guilt would the documentation have any relevance.

In the facts of this case, all the reliable information known to the officers was that a) there was the smell of marijuana, and b) the

Defendant presented written medical authorization to use marijuana. Considering all of that information leaves no reasonable conclusion that a crime is being committed.

The trial court erred in concluding that the information in the affidavit amounted to probable cause. The mere odor of marijuana, coupled with presentation of a valid document from a doctor authorizing the use of marijuana for medicinal purposes, does not constitute probable cause to search. This Court should reverse the trial court's conclusion of law, hold the warrant invalid, and order the charged dismissed.

2. The trial court erred in not allowing Appellant to present a defense based on medical authorization to possess marijuana

Review of this issue should be accepted pursuant to RAP 13.4(b)(4) as involving an issue of substantial public interest. This conviction rests upon stipulated facts and exhibits. Where the court considered no live testimony in concluding that the defendant was guilty, review is therefore de novo. *State v. Karpenski,* 94 Wn. App. 80, 104, 971 P.2d 553 (1999). Moreover, where the issues before the

appellate court are whether the court's factual findings are adequate to support the court's conclusion that a defendant has failed in his burden of satisfying the requirements of the Medical Use of Marijuana Act, review is de novo. *State v. Hurt,* 107 Wn. App. 816, 822, 27 P.3d 1276 (2001) (interpretation of a statute is reviewed de novo); *State v. Shepherd* 110 Wn. App. 544, 550, 41 P.3d 1235 (2002).

In *State v. Shepherd* 110 Wn. App. 544, 546, 41 P.3d 1235 (2002), one issue was whether a physician's statement that "the potential benefits of the medical use of marijuana *may* outweigh the health risks for this patient" is sufficient to satisfy the "valid documentation" requirement of the Act that "the potential benefits of the medical use of marijuana *would likely* outweigh the health risks for a particular qualifying patient[.]" RCW 69.51A.010(5)(a) (emphasis added). Division III of the Court of Appeals concluded that it does not, and affirmed the conviction. 110 Wn.App. at 546.

However, on the issue of what is a "qualifying patient", *Shepard* supports that the documentation in Mr. Fry's case was sufficient.

In *Shepard*, the State charged Mr. Shepherd by amended

complaint with felony possession of marijuana. The physician's documentation stated:

> I have diagnosed and am treating the above named patient for a terminal illness or debilitating condition as defined in RCW 69.51A.010 (should the conditions be listed, a check list? I think not as it may be seen as violating physician-patient confidentiality).
> I have advised the above named patient about the potential risks and benefits of the medical use of marijuana. I have assessed the above named patient's medical history and medical condition. It is my medical opinion that the potential benefits of the medical use of marijuana may outweigh the health risks for this patient.
>
> *Shepherd* 110 Wn. at 547.

Significantly, the *Shepard* opinion states:

> The trial court found, and we agree, that Mr. Wilson satisfies the requirements of a "qualifying patient." RCW 69.51A.010(3). That is, someone who has been diagnosed with a debilitating medical condition, has been advised of the risks and benefits of the use of marijuana, and has been advised by the physician that he or she may benefit from the medical use of marijuana.
>
> *Shepherd*, 110 Wn. App. 550-551.

Sheperd sets forth the standard of proof for the affirmative defense:

> Mr. Shepherd is required to show only by a

> preponderance of evidence that he has met the requirements of the Medical Use of Marijuana Act for affirmatively defending this criminal prosecution. *State v. Riker,* 123 Wn.2d 351, 368, 869 P.2d 43 (1994). That means considering all the evidence the proposition asserted must be more probably true than not true. 11 Washington Pattern Jury Instructions: Criminal 52.01 (2d ed.1994); *United States v. Lemon,* 824 F.2d 763 (9th Cir.1987).
>
> *Shepherd* 110 Wn. App. at 550.

A defendant asserting an affirmative defense, such as the compassionate use defense, bears the burden of offering sufficient evidence to support that defense. *State v. Janes,* 121 Wn.2d 220, 236-37, 850 P.2d 495 (1993). In *State v. Tracy* 158 Wn.2d 683, 689, 147 P.3d 559 (2006) the Supreme Court of Washington held that Tracy bore the burden of producing at least "some evidence" that she was a qualified patient of a qualified physician before she could assert the compassionate use defense.

Because the documentation in *Sheperd* did not specify what the "debilitating" condition was, yet Sheperd was found by the Court of Appeals, Division III. to be a "qualifying patient," then so too must Mr. Fry be a "qualifying patient" because in his doctor's opinion, he has a "debilitating condition." Mr. Fry more than met the "some

evidence" test to assert the affirmative defense. Here, the trial court did not even allow him to go forward with the defense. See Finding of Fact 3, CP 46.

The trial court's holding that Mr. Fry was not a qualifying patient because the "debilitating" condition was not further specified in the physician's statement must be reversed pursuant to *Sheperd*. This Court should reverse the conviction and remand with directions that Mr. Fry be permitted to present his affirmative defense at trial.

D. CONCLUSION

This Court should accept review, hold that there was no probable cause for issuance of the search warrant, suppress the evidence and direct the trial court to dismiss the charge.

Alternatively, this Court should accept review, and hold the trial court erred in refusing to allow the Defendant to present a defense based on medical use of marijuana, reverse the conviction, and remand for trial.

Respectfully submitted,

February 6th 2008

William Edelblute
Attorney for Petitioner
WSBA 13808

Certificate of Mailing

I hereby certify that on the 6th day of February , 2008, I mailed true and accurate copies of the foregoing Petition to, John Troberg , Deputy Prosecuting Attorney, at P.O. Box 390, Colville, WA 99114-0390 and to Jason L. Fry, Appellant, at 850-I, Finley Gulch, Colville, WA 99114 , postage prepaid.

William Edelblute
Attorney for Petitioner
WSBA 13808

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	**No. 25524-7-III**
Respondent,	**Division Three**
v.	
JASON LEE FRY,	**PUBLISHED OPINION**
Appellant.	

SCHULTHEIS, J. — Following the denial of a suppression motion, Jason Lee Fry was convicted on stipulated facts of possession of over 40 grams of marijuana. On appeal, he contends his production of an authorization for medical use of marijuana negated probable cause to search his house. He also asserts the trial court erred in rejecting his proposed defense under the Washington State Medical Use of Marijuana Act (the Act), chapter 69.51A RCW. We affirm.

FACTS

The facts are undisputed. On December 20, 2004, Stevens County sheriff's deputies went to Mr. Fry's house after obtaining information that he was growing marijuana. As officers approached the front porch, they could smell marijuana. When Mr. Fry opened the front door, the odor of marijuana was even stronger. Mr. Fry told the

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officers he had a prescription for marijuana and asked them to leave. His wife produced a document entitled "Documentation of Medical Authorization to Possess Marijuana for Medical Purposes in Washington State" for Mr. Fry. Clerk's Papers (CP) at 8. The authorization stated that marijuana may help Mr. Fry's "severe anxiety, rage, & depression related to childhood." CP at 9.

Officers obtained a search warrant and found several containers of marijuana and numerous marijuana plants. The seized amount totaled more than two pounds (911 grams). The State charged Mr. Fry with manufacturing marijuana and possession of more than 40 grams of marijuana.

Mr. Fry moved to suppress the evidence, arguing that once the officers were shown the medical use document, probable cause for the search no longer existed. The State countered that medical use of marijuana under the Act is an affirmative defense for trial, not a defense to probable cause.

The court denied Mr. Fry's motion, finding the odor of marijuana provided probable cause to search his home and any evidence found as a result could either support or refute the medical marijuana affirmative defense. It also found that an affirmative defense does not negate probable cause, reasoning that such defenses are for the trier of fact not for earlier stages in the proceedings. The court granted Mr. Fry's request for a stay pending his motion for discretionary review. A commissioner of this court denied Mr. Fry's motion for discretionary review.

The State moved in limine to exclude the medical use defense, arguing that Mr. Fry was not a qualifying patient under the Act because severe anxiety is not a terminal or debilitating condition as defined by the Act. The trial court excluded use of the defense. Following a bench trial on stipulated facts, Mr. Fry was convicted of possession of over 40 grams of marijuana. The manufacture of marijuana charge was dismissed.

DISCUSSION

We first address Mr. Fry's contention that the trial court erred in ruling that officers had probable cause to search his house after he produced medical authorization for marijuana use. Mr. Fry argues that his production of a medical use certificate negated probable cause for the search. Citing *McBride v. Walla Walla County*, 95 Wn. App. 33, 40, 975 P.2d 1029, 990 P.2d 967 (1999), the State counters that the medical use affirmative defense does not negate probable cause. Rather, the defense is to be determined by a judge or jury at trial, not law enforcement.

We review conclusions of law in an order pertaining to suppression of evidence de novo. *State v. Ross*, 106 Wn. App. 876, 880, 26 P.3d 298 (2001). Mr. Fry does not challenge the trial court's findings of fact; therefore they are verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

A search warrant may be issued only upon a finding of probable cause. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Probable cause supports a search warrant if the affidavit contains sufficient facts and circumstances to establish that the

defendant is probably involved in criminal activity and that evidence of a crime will be found at the place to be searched. *Id.* It is well settled that when a trained officer smells marijuana, this alone provides probable cause for a search. *State v. Olson*, 73 Wn. App. 348, 356, 869 P.2d 110 (1994).

Medical authorization for marijuana use is an affirmative defense under the Act. Former RCW 69.51A.040(1) (1999). Affirmative defenses are evaluated at trial, not by law enforcement at earlier stages of the proceedings. *McBride*, 95 Wn. App. 33. The issue in *McBride* was whether the affirmative defense of self-defense negated probable cause to arrest the defendant for assault. The defendant did not dispute hitting the victim, but claimed officers lacked probable cause to arrest him because they had information he was acting in self-defense. In concluding that the self-defense claim did not weaken probable cause, the court reasoned:

> Self-defense is an affirmative defense which can be asserted to render an otherwise unlawful act lawful. But the arresting officer does not make this determination. The officer is not judge or jury; he does not decide if the legal standard for self-defense is met. Moreover, . . . [the arresting officer] had only one side of the story. Mr. McBride's claim of self-defense was then a mere assertion, not fact. The self-defense claim did not vitiate probable cause.

Id. at 40.

This reasoning applies here. Information relating to the validity of a suspect's medical use defense will almost always be within the defendant's knowledge. The defendant's assertion of the defense is not necessarily a fact; further development of the

facts at trial may well show that the medical use defense is not viable. Therefore, the mere production of a document purporting to be a marijuana use authorization does not prohibit further investigation by the State. Here, probable cause to search Mr. Fry's house existed as soon as officers smelled marijuana. His production of a medical use document did not provide automatic protection against a reasonable police investigation and search. Whether the affirmative defense of medical use of marijuana was viable was an issue for trial.

Next, we address whether the trial court erred in disallowing Mr. Fry's medical marijuana defense. Again, because this involves a question of law, our review is de novo. *Ross*, 106 Wn. App. at 880.

Former RCW 69.51A.040(1) states "any qualifying patient who is engaged in the medical use of marijuana . . . will be deemed to have established an affirmative defense to . . . charges [of violating marijuana law] by proof of his or her compliance with the requirements provided in this chapter." Under this statute, a qualifying patient means a person who:

> (a) Is a patient of a [licensed] physician . . . ;
> (b) Has been diagnosed by that physician as having a terminal or debilitating medical condition;
> (c) Is a resident of the state of Washington at the time of such diagnosis;
> (d) Has been advised by that physician about the risks and benefits of the medical use of marijuana; and
> (e) Has been advised by that physician that they may benefit from the medical use of marijuana.

RCW 69.51A.010(3).

The trial judge prevented Mr. Fry from bringing the defense on the ground that his condition was not a terminal or debilitating medical condition under the Act. A terminal or debilitating medical condition includes:

> (a) Cancer, human immunodeficiency virus (HIV), multiple sclerosis, epilepsy or other seizure disorder, or spasticity disorders; or
> (b) Intractable pain, limited for the purpose of this chapter to mean pain unrelieved by standard medical treatments and medications; or
> (c) Glaucoma . . . ;
> (d) Any other medical condition duly approved by the Washington state medical quality assurance board [commission] as directed in this chapter.

Former RCW 69.51A.010(4) (1999).

Mr. Fry is required to show by a preponderance of the evidence that he has met the requirements of the Act. *State v. Shepherd*, 110 Wn. App. 544, 550, 41 P.3d 1235 (2002). He fails to do so. Relying primarily on *Shepherd*, Mr. Fry claims that because that court found the defendant was a "qualifying patient" under the Act even though his medical use document did not specify his terminal or debilitating condition, Mr. Fry must qualify because his physician determined that he had a debilitating condition.

But Mr. Fry's reliance on *Shepherd* is misplaced. In that case, the defendant suffered from a debilitating spine condition. His physician's authorization for medical use stated that he was treating the defendant for a "'terminal illness or debilitating condition as defined in RCW 69.51A.010,'" but declined to specify the condition. *Id.* at

547. However, the *Shepherd* court was not asked to determine whether Mr. Shepherd's condition qualified under the Act. In fact, it appears the parties did not dispute that the defendant suffered from a debilitating condition. *Shepherd* is not instructive here.

Mr. Fry's physician authorized the use of marijuana to treat Mr. Fry's severe anxiety and anger. Although former section (4)(d) of the Act permits the Washington State Medical Quality Assurance Commission to approve conditions in addition to those listed in former RCW 69.51A.010(4), Mr. Fry's condition is not among them. Therefore, as a matter of law, Mr. Fry is not a qualifying patient, and cannot avail himself of the medical marijuana defense. We conclude the trial court did not err in prohibiting Mr. Fry from presenting the medical use defense.

Affirmed.

Schultheis, J.

WE CONCUR:

Sweeney, C.J.

Brown, J.